complete authority to pass such measures in the regulation of their internal concerns as they deem necessary for the public good and prosperity as well as for the public health and safety.[10] This power was never surrendered to the general government.[11] Under it they can properly charter a corporation with privileges designed to develop the natural resources of the State. And the Supreme Court has emphasized the necessity, in order to maintain the autonomy of the State governments, of preserving to them their police power unimpaired by unwarranted Federal encroachment under the authority of the commerce clause.[12] This independence from Federal authority applies, of course, only to State legislation which is directed to matters of strictly internal concern. Although the power of Congress over commerce is exclusive, the States, in pursuance of the objects stated above, may properly legislate with reference to subjects which incidentally effect interstate commerce.[13] For example, as in the principal case, they may authorize a corporation to produce coal and carry it in interstate transportation. But in this domain, unlike in their independent internal jurisdictions, their power is completely subordinated, and State legislation is operative only as long as it does not conflict with the valid exercise of Federal power.[14] So the authority of the State is no protection to a corporation against the subsequent exertion of the paramount authority of the Federal government.[15] But to validate this assertion of superior right Congress must act fairly within the scope of its enumerated powers. So by the "Commodities Clause" the State-created privileges of the carriers may be abrogated only if the enactment is truly a regulation of interstate commerce. That it is such a regulation is disputed.[16] It is urged that it is essentially a regulation of production, a subject to which the commerce power does not extend,[17] and is an unlawful attempt to enlarge the Federal power by indirection.[18] In opposition to this view it is to be maintained that, irrespective of its specific purpose, the Act is on its face, as well as in its ultimate aim, a regulation of interstate transportation, an activity surely within the commerce power. On the solution of this jurisdictional issue raised depends fundamentally the determination of the question whether Congress can lawfully abrogate the joint privilege of production and transportation established in the carrier by the legislative authority of the States.

PATENT RIGHTS AND THE SHERMAN ANTI-TRUST ACT.—The purpose of the Sherman Anti-trust Act and similar legislation in the different states is to allow commerce to take its natural course unrestricted, and to preserve

[10]Lake Shore & Mich. South. Ry. *v.* Ohio (1898) 173 U. S. 285; U. S. *v.* E. C. Knight (1894) 156 U. S. 1.

[11]Lottery Case, *supra*, 364, 365.

[12]U. S. *v.* E. C. Knight, *supra*, at 13.

[13]Crandall *v.* Nevada (1867) 6 Wall. 35, 42; 9 COLUMBIA LAW REVIEW 375, 381. This power of a state to authorize interstate transportation has been challenged by a recent text writer, but seems generally admitted. Cooke, Commerce Clause 280.

[14]Northern Securities Co. *v.* U. S. (1903) 193 U. S. 197, 347; Lake Shore & Mich. South. Ry. *v.* Ohio, *supra*, 297; Gulf, Colo. etc. Ry. *v.* Hefley (1894) 158 U. S. 98; 9 COLUMBIA LAW REVIEW 66, 348.

[15]Union Bridge Co. *v.* U. S. (1907) 204 U. S. 364.

[16]P. C. Knox in 17 Yale Law Jour. 139; but cf. Address to Pittsburg Chamber of Commerce, 36 Cong. Rec. 413.

[17]Kidd *v.* Pearson (1888) 128 U. S. 1; U. S. *v.* E. C. Knight, *supra*.

[18]McCulloch *v.* Maryland (1819) 4 Wheat. 316, 423.

to the public the benefits of competition.[1] The patent laws, on the other hand, seek to encourage invention by granting to the inventor for a limited period the right to exclude competitors from the manufacture and sale of the patented article.[2] Public policy requires both in our legislation, but whether the patent laws or the anti-trust laws are to govern is sometimes difficult to determine. Where there is a single patent, or a group of related non-competing patents, in the hands of a single holder, the law seems well settled.[3] It follows from the nature of a patent right that the holder has complete control over the thing patented; he may determine arbitrarily who shall manufacture it, the quantity to be manufactured, or the selling price.[4] A patent is assignable, and, when assigning, the patentee may lawfully agree not to compete during the life of the patent, or he may agree to anything else necessary to protect his assignee.[5] Such is the nature of the patent right. State laws, of course, must yield when the national patent statutes conflict,[6] and the Sherman Act has been construed not to interfere.[7] The patentee may license a number of others and agree with each individually,[8] or with all collectively,[9] to apportion the output, to pool the profits, or to eliminate competition in some other way. In such circumstances any restraint of trade is due rather to the patent than to the agreement between the parties.[10]

Where, however, the patents to competing inventions are in the hands of different owners, and to eliminate competition an agreement is entered into between the competing owners, or a similar device is resorted to, a more difficult question is presented. The legality of the acquisition by a single corporation of all patent rights to articles competing with its own products is as yet undetermined. The question seems closely related to that of the purchase by one corporation of the business of its competitors.[11] A second problem is this: A, B, and C, each owning separate and competing patents, assign to X, who, in turn, licenses each assignor to manufacture under the patent he formerly owned, and, at the same time, all agree to pool profits or perhaps to apportion output. The Supreme Court found the decision of this question unnecessary in *Bement* v. *National Harrow Co.*,[12] although the lower Federal Courts, without reference to the

[1]Noyes, Intercorporate Relations (2d Ed) § 378; U S. *v.* Hopkins (1897) 82 Fed. 529, 537.

[2]Walker, Patents § 155; Patterson *v.* Kentucky (1878) 97 U. S. 501; Jewett *v.* Atwood, etc., Co. (1900) 100 Fed. 647.

[3]4 COLUMBIA LAW REVIEW 370; Noyes, Intercorporate Relations § 399.

[4]Bement *v.* National Harrow Co. (1901) 186 U. S. 70; Clark *v.* Wire Co. (1899) 22 Tex. Civ. App. 41, 44; Victor Talking Machine Co. *v.* Fair (1903) 123 Fed. 424. See *dictum* in National Phonograph Co. *v.* Lagle (1902) 117 Fed. 624, *contra.*

[5]Morse Drill Co. *v.* Morse (1869) 103 Mass. 73. In Strait *v.* Harrow Co. (1891) 18 N. Y. Supp. 224, it was held that an agreement which extended beyond the life of the patents was on that account void.

[6]Columbia Wire Co. *v.* Freeman Wire Co. (1895) 71 Fed. 302, 306; U. S. etc. Raisin Co. *v.* Griffin (1903) 126 Fed. 364, 370.

[7]Bement *v.* National Harrow Co., *supra.*

[8]Indiana Co. *v.* Case Co. (1907) 154 Fed. 365.

[9]Rubber etc. Co. *v.* Milwaukee etc. Co. (1907) 154 Fed. 358.

[10]But, it should be noted, a patent right may be limited where the article becomes affected with a public use. A condition in a license by the patentee that the licensee should not furnish telephone service to competitors of the Western Union Telegraph Co. was held void. Chesapeake etc. Tel. Co. *v.* Telegraph Co. (1884) 66 Md. 399.

[11]The Circuit Court of Appeals has declared that a patented article is not a subject of interstate commerce, from which it follows that such a combination is legal; but Judge Grosscup, though concurring in the result, dissented from this reasoning. Indiana Co. *v.* Case Co., *supra;* Rubber etc. Co. *v.* Milwaukee Co., *supra.*

[12](1901) 186 U. S. 70.

Sherman Act, had previously declared such an agreement illegal.[13] Its legality, however, was affirmed by the Circuit Court of Appeals in a California case; but this decision, it is submitted, rests upon an erroneous conception of *Bement* v. *National Harrow Co.*[14] As, in such cases, the restraint of trade arises clearly from the agreement and not from the patents, the existence of patent rights seems immaterial. A third problem is presented by agreements in which the different owners of competing patents, without, however, assigning their patent rights, mutually agree to maintain prices, to pool profits, or otherwise to restrict competition. In Massachusetts an agreement to sell through a common agent was upheld because it was found to be a reasonable restraint of trade;[15] but such a decision could scarcely have been reached in the Supreme Court where, under the Sherman Act, the reasonableness of the restraint is immaterial.[16] In New York a similar agreement in regard to patent or proprietary medicines was sustained;[17] but the Federal courts later reached an opposite conclusion upon essentially the same agreement.[18] An analogous question has arisen in connection with the so-called Book Trust. The publishers of copyrighted books agreed with the Dealers' Association not to sell to those refusing to maintain fixed prices. In New York this agreement was declared illegal because it included uncopyrighted books,[19] but the same agreement, amended to include only copyrighted books, was declared illegal in the Federal courts, under the Sherman Act.[20]

In a recent Federal case, *Blount Mfg. Co.* v. *Yale & Townsend Co.* (1909) 166 Fed. 555, the question of an agreement between the owners of competing patents to pool profits, eliminate competition and restrict output was squarely before the court which held the agreement illegal under the Anti-Trust Act. This application of the Statute is manifestly proper in view of the above principles. There is nothing in the nature of a patent right which warrants such a contract, commerce is restrained in a way not contemplated in the grant of the patent, and a control of the trade is attained that the legal monopolies of the separate patents alone would never have effected.

CONTINUING AND PERMANENT NUISANCES.—The question which nuisances are to be regarded permanent, and which temporary or merely "continuing," is often of great importance. For since a permanent nuisance constitutes a single wrong, whereas every instant of the existence of a continuing nuisance is a fresh tort, the statute of limitations runs against

[13]National Harrow Co. *v.* Quick (1895) 67 Fed. 130; Same *v.* Hench (1897) 83 Fed. 36.

[14]U. S. etc. Raisin Co. *v.* Griffin (1903) 126 Feb. 364. Columbia Wire Co. *v.* Freeman Wire Co. (1895) 71 Fed. 302, is to be distinguished on the ground that the license contained no agreement to control prices or restrict competition. See also Vulcan Powder Co. *v.* Powder Co. (1892) 96 Cal. 510.

[15]Central Shade Roller Co. *v.* Cushman (1887) 143 Mass. 353.

[16]U. S. *v.* Trans-Missouri Frt. Assn. (1896) 166 U. S. 290.

[17]Park *v.* Nat'l Druggist Assn. (1903) 175 N. Y. 1.

[18]Jayne *v.* Loder (1906) 149 Fed. 21.

[19]Straus *v.* American Pub. Assn. (1904) 177 N. Y. 473.

[20]Bobbs-Merril Co. *v.* Straus (1905) 139 Fed. 155; Mines *v.* Scribner (1906) 147 Fed. 927.